

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

IN RE: MURPHY, Gerald B.)	
)	APPEAL NO. _____
SERIAL NO: 09/777,761)	
)	
FOR: METHOD FOR STRATEGIC)	
COMMODITY MANAGEMENT)	
THROUGH MASS CUSTOMIZATION)	
)	
)	BRIEF ON APPEAL
FILED: February 6, 2001)	
)	
GROUP ART UNIT: 3626)	
)	
CONFIRMATION NO: 4274)	
)	

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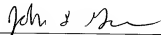
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I. INTRODUCTION

The present inventor's contribution is a systematic method for an income-based approach to strategic marketing action plans that lenders rely upon when making financing decisions, and indeed they do (Exhibit 1). The invention provides for an interactive income model for independent ag producers that maximizes income, facilitates beneficial financing, and assures income to pay off debt.

There is no other known business approach or patent like it. It is not a production model. It is not a contract approach which removes the business independence of an ag producer and limits profitability. It does not just mention marketing nor discuss commodity marketing in general terms. The invention actually establishes strategic market action plans for each ag producer setting future market selling points which are profitable selling targets with assigned probabilities to each price target based on market risks and individualized business risks. In essence the present invention provides a bundled income approach for each independent ag producer that joins together three aspects of business: i.e. financing; selling commodities to maximize income and profitability; and assuring income through Crop Revenue Insurance to guarantee and to pay off debt.

Financing is underwritten by strategic commodity marketing action plans that maximize income (pre-selling the exact, right amount of commodities at best, certain prices by predicting profitable future price targets with assigned probabilities individualized to each independent business). Probabilities assigned to each price target reveal just how reachable the price target is and helps each producer to make an objective, decisive selling decision to arrive at desirable income goals. The strategic commodity marketing is then underwritten by crop revenue insurance that assures business income and debt payoff.

In constructing the rejections presented, the Examiner improperly ignores the invention as a whole, applies improper hindsight and misconstrues the prior art references. The Examiner should be reversed.

II. REAL PARTY IN INTEREST

The real party in interest for this application is the MAKAR Enterprises, Inc., the Assignee of record for this application. An assignment has been recorded at Reel 014707 and Frame 0600 on June 14, 2004.

III. RELATED APPEALS AND INTERFERENCES

None.

IV. STATUS OF CLAIMS

Claims 15 and 17-29 stand pending and rejected. The rejections to claims 15 and 17-29 are appealed.

V. STATUS OF AMENDMENTS

An Amendment After Final Rejection was filed March 16, 2007 with amendments to the claims. An Advisory Action of March 23, 2007 entered these amendments. Thus, all amendments have been entered.

VI. SUMMARY OF CLAIMED SUBJECT MATTER

Claim 15 is directed towards a computer-assisted method of providing agricultural marketing services to independent agricultural producers to assist in raising the income of the agricultural producers (see e.g. p. 9, lines 2-19). The method includes developing written agricultural marketing action plans. The agricultural marketing action plans require updated marketing information (p. 9, lines 9-18). The method also provides for tying financial obligations of the agricultural producers to the use of the written agricultural marketing action plans such that the agricultural producers are required to commit to using the written agricultural marketing plans as a condition for receiving financing (p. 6, lines 16-20). The method further includes electronically providing marketing information to the agricultural producers in order to update the written agricultural marketing action plans (p. 7, lines 9-12).

The updated marketing information includes probabilities assigned to each price target to help each producer make an objective selling decision to arrive at desirable income goals (p. 45, line 12 to p. 46, line 20).

The steps to develop written agricultural marketing action plans for each of the independent agricultural producers include (a) eliciting information from the producer, (b) performing a financial assessment for an agricultural business of the independent producer, (c) determining a financial assessment score based on the financial assessment, (d) calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numeric value describing financial risks related to markets and income of each agricultural enterprise associated with the agricultural business, (e) determining pre-sell quantities using the financial assessment score, the marketing financial risk score and a price risk associated with a commodity market, (f) calculating a level of crop revenue insurance to assure a predetermined level of income from sale of predetermined pre-sell quantities of crops for use in meeting the financial obligations, such that the financing is underwritten by pre-selling and the pre-selling is underwritten by the level of crop revenue insurance, and (g) forming a plan of action for agricultural marketing which makes decisions based on the marketing information, the financial assessment, the marketing financial risk score, the pre-sell quantities, and the level of crop revenue insurance (FIG. 2A through FIG. 5).

Claim 17 is directed towards a computer-assisted method of creating a strategic agricultural marketing plan for an agricultural business of an independent agricultural producer. This method includes eliciting information from a producer (FIG. 2A-2B), performing a financial assessment of the business of the independent agricultural producer (FIG. 2B, step 132), determining a financial assessment score based on the financial assessment (FIG. 2C), and calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numeric value describing financial assessment factors associated with financial risks related to markets and income of each enterprise of the agricultural businesses (FIG. 2D). The method further includes receiving a price risk from a marketing service, wherein the price risk is a price risk of a commodity market and is

determined by computer analysis; determining pre-sell quantities using the financial assessment score, the marketing financial risk score and the price risk of the commodity market; and calculating a level of crop revenue insurance to assure at least a predetermined level of income from sale of predetermined pre-sell quantities of crops, thereby underwriting the predetermined level of income by pre-selling and underwriting the pre-selling by the level of crop revenue insurance (FIG. 2E through FIG. 5).

Claim 18 is directed towards a method of providing assured income for agricultural crops. The method includes underwriting financing of an independent agricultural producer of the agricultural crops (thus allowing the independent agricultural producer to payoff debt) by developing a strategic marketing action plan for the independent producer which provides the assured income based on a minimum level of crop yield and a predetermined minimum crop price achieved by pre-selling, the developing of the strategic marketing action plan including determination of a financial assessment score associated with the producer and a marketing financial risk score defining financial risks related to markets and income of the producer to assist in determining the assured income for the producer, underwriting the strategic marketing action plan with crop insurance to assure the minimum level of crop to be sold (FIG. 2A through FIG. 5). The method further includes updating the strategic marketing action plan with electronically supplied updated marketing information and implementing the updated strategic marketing action plan to capture additional income beyond the assured income (p. 7, lines 9-12).

Claim 29 is directed towards a computer-assisted method of creating a strategic independent agricultural marketing plan for an agricultural business. The method includes determining a financial assessment score for the agricultural business, determining a marketing financial risk score for each agricultural enterprise of the business, the marketing financial risk score associated with financial risks related to markets and income of each of the agricultural enterprises, receiving a price risk from a marketing service, wherein the price risk is a price risk associated with a commodity market and is determined using a computer analysis, determining a level of assured income for each of the agricultural enterprises based

on the financial assessment score, the marketing financial risk score, and the price risk, determining pre-sell quantities of crops for pre-selling for each of the agricultural enterprises, and calculating a level of crop revenue insurance for each of the agricultural enterprises to protect revenue generated from pre-selling, thereby underwriting the pre-selling with the crop revenue insurance and underwriting the assured income with the pre-selling (FIG. 2A through FIG. 5).

VII. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

A. Whether claim 15 is unpatentable under 35 U.S.C. § 103(a) as being obvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of U.S. Patent Publication No. 2002/0023052A1 to Remley et al. and further in view of O'Brien ("Grain Marketing Plans for Farmers").

B. Whether claim 29 is unpatentable under 35 U.S.C. § 103(a) as being obvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of U.S. Patent Publication No. 2002/0023052A1 to Remley et al. and further in view of O'Brien ("Grain Marketing Plans for Farmers").

C. Whether claims 17 and 23 are unpatentable under 35 U.S.C. § 103(a) as being obvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of O'Brien ("Grain Marketing Plans for Farmers").

D. Whether claims 18 and 19 are unpatentable under 35 U.S.C. § 103(a) as being obvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of U.S. Patent Publication No. 2002/0023052A1 to Remley et al. and further in view of O'Brien ("Grain Marketing Plans for Farmers").

E. Whether claims 20, 21, and 22 are unpatentable under 35 U.S.C. § 103(a) as being obvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view O'Brien ("Grain Marketing Plans for Farmers") and further in view of Friedman ("Dictionary of Business Terms").

F. Whether claims 24-28 are unpatentable under 35 U.S.C. § 103(a) as being obvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view O'Brien ("Grain Marketing Plans for Farmers") and further in view of U.S. Patent No. 6,990,459 to Schneider.

VIII. ARGUMENT

A. Claim 15 is nonobvious with respect to U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of U.S. Patent Publication No. 2002/0023052A1 to Remley et al. and further in view of O'Brien ("Grain Marketing Plans for Farmers").

1. Neither Hay, nor Remley et al. nor O'Brien, alone or in combination teach "determining a financial assessment score based on the financial assessment."

One of the four factual inquiries under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966) is ascertaining the differences between the prior art and the claims in issue. The Examiner has erred in this factual inquiry by misinterpreting the prior art references relied upon and thus, the Examiner should be reversed. The Examiner has cited to paragraph 51 and paragraph 52 of Hay as disclosing "determining a financial assessment score based on the financial assessment" indicating that the Examiner interprets "factor" to be a form of "score" (Office Action of January 3, 2007, p. 2-3, numbered paragraph 3). However, neither Hay, nor Remley et al. nor O'Brien alone or in combination may be properly interpreted as disclosing such a step in the context of claim 15. Paragraphs 51 and 52 of Hay are directed towards risk factors taken into account when determining what price to offer a producer for their production contract.

[0051] The risk identifier 64 accesses a database of risk factors to identify risk factor(s) associated with the farm of interest. Risk factor(s) identified by the risk identifier 64 can be agronomic in nature (e.g., weather related, farmer yield history, etc.) and/or financial in nature (e.g., farmer credit history). Examples of risk factor include climate risk, farmer performance risk, yield risk, and competition risk. The risk factor data is developed from historical agricultural data. The risk factor data is valued using well known actuarial analysis.

[0052] The pricing engine 66 cooperates with the production estimator 62 and the risk identifier 64 to develop price(s) to be offered the farm(s) to grow the crop of interest to the agricultural entity. For each farm, the pricing engine 66 develops the price to be offered based upon: (a) the expected yield of the subject farm, (b) the risk factor(s) for the subject farm, (c) the customer market price expected to be earned by the product of interest; (d) the profit to be earned by the farm for the competing product, and (e) the profit to be earned by the agricultural entity. Thus, the pricing engine calculates the price at which the farm(s) of interest would have a financial incentive to grow the crop of interest taking into account any premiums to be provided by the agricultural entity based upon the preceding factors (a) through (e). If a farm under analysis is associated with more than one elevator and/or loader, the offer developer 60 preferably determines the possible offer based upon the elevator/loader that will enable that farm to earn the highest profit.

The cited portion of Hay gives examples of risk factors and mentions that risk factors may be financial in nature. Yet, such disclosure falls short from "determining a financial assessment score based on the financial assessment." Particularly, where Hay's clear intent is to use its pricing engine to develop an offer of a production contract that might be acceptable to a producer, it is clear that parties to a production contract are on opposite sides of the bargain. Hay does not disclose that the information necessary to perform a financial assessment is present, nor does the producer appear to participate in Hay's method of valuing risk factor data.

Thus, the Examiner's rejections must be reversed because the Examiner has not properly ascertained the differences between the prior art and the claims in issue.

2. Neither Hay, nor Remley et al. nor O'Brien, alone or in combination teach "calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numeric value describing financial risks related to markets and income of each agricultural enterprise associated with the agricultural business."

The Examiner cites to paragraph 52 of Hay (quoted above) as disclosing the step of "calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numeric value describing financial risks related to markets and income of each agricultural enterprise associated with the agricultural business." The plain language of claim 15 provides a definition for the marketing financial risk score. Hay's general discussion regarding risks does not describe a marketing financial risk score. This should be particularly apparent where Hay is directed towards a production contract for contracting companies as opposed to an independent sales agreement for independent producers.

In a production contract of Hay, there is no marketing as the producer does not own the crop grown, but rather agrees to produce a crop for a contracting company according to the specifications of the contracting company. In a production contract of Hay, there could be no marketing financial risk as there is no marketing of crops by the producer, because the producer does not own or sell the crop, but rather is paid for producing a crop for someone else. **A production contract is unrelated to an independent marketing plan and does not provide for quantifying a marketing financial risk score.**

Neither Hay, nor Remley et al. nor O'Brien alone or in combination teach "calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numeric value describing financial risks related to markets and income of each agricultural enterprise associated with the agricultural business", thus the Examiner should be reversed for this reason as well, as under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966), the Examiner has not properly ascertained the differences between the prior art and the claims in issue, but has misinterpreting the prior art references relied upon.

3. Neither Hay, nor Remley et al. nor O'Brien, alone or in combination teach "determining pre-sell quantities using the financial assessment score, the marketing financial risk score and a price risk associated with a commodity market."

The Examiner cites to paragraphs 62, 68, 118, 113, and 52 of Hay as disclosing this step. In fact, neither Hay, nor Remley et al. nor O'Brien et al. alone or in combination teach such a step. As there is no disclosure of determining a marketing financial risk score, there certainly is no disclosure of determining pre-sell quantities using such a score. Moreover, Hay's discussion of risks is for purposes of its pricing engine which is used to determine offers to producers in the context of offering a production contract, and thus, a determination of a pre-sell quantities is not made, as a production contract is made instead. As one skilled in the art would appreciate from studying of Hay, a production contract is an agreement under which a producer raises a crop for a contracting company (according to their specifications) in return for a premium paid at harvest. See e.g. paragraph [0003-0006] of Hay. A production contract is simply not an agreement to pre-sell quantities of the crop because in a production contract situation, a producer is not producing to sell crop, but rather is producing under the contract." A production contract is not a marketing agreement. Thus the Examiner should be reversed for this reason as well, as under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966), the Examiner has not properly ascertained the differences between the prior art and the claims in issue, but has misinterpreting the prior art references relied upon.

4. Neither Hay et al. nor Remley et al. nor O'Brien disclose "calculating a level of crop revenue insurance to assure a predetermined level of income from sale of pre-determined quantities of crops for use in meeting the financial obligations, such that the financing is underwritten by pre-selling and the pre-selling is underwritten by the level of crop revenue insurance."

Claim 15 requires "calculating a level of crop revenue insurance to assure a predetermined level of income from sale of pre-determined quantities of crops for use in

meeting the financial obligations, such that the financing is underwritten by pre-selling and the pre-selling is underwritten by the level of crop revenue insurance." As the Examiner recognizes, neither Hay et al. nor Remley et al. disclose this limitation (Office Action of January 3, 2007, p. 4). As O'Brien does not disclose this limitation, the Examiner must be reversed.

The Examiner relies on O'Brien, to disclose the limitation of "calculating a level of crop revenue insurance to assure a predetermined level of income from sale of predetermined quantities of crops for use in meeting the financial obligations, such that the financing is underwritten by pre-selling and the pre-selling is underwritten by the level of crop revenue insurance." In the paragraph spanning p. 13-14, O'Brien indicates that "The insured crop production levels of MPC1 and crop revenue levels of CRC can be used as guidelines to determine the maximum amount of production that a producer may commit to preharvest pricing strategies." The Examiner's reliance on O'Brien is misplaced. O'Brien does not calculate a level of crop revenue insurance to assure a pre-determined level of income from sale of pre-determined quantities of crops. O'Brien's teaching is clear in that the insured crop production level is chosen first and used as a guideline to suggest an amount of production that a producer may pre-sell. There is no objective process as in the present invention. Such apparent guessing of a level of crop insurance and letting it dictate bushels to sell is haphazard and does provide for achieving income goals. This type of approach is consistent with a production-oriented approach as opposed to an income based approach of the claim 15. In fact, one of the very objectives of the present invention is "to provide for optimized selection of a crop insurance revenue plan" to maximize income (p. 6, lines 10-12). It is further observed that O'Brien's reference to "guidelines" is further evidence of the type of approach normally taken by producers. Guidelines, rules-of-thumb, and the like, are exactly what the present invention avoids by providing a strategic plan directed towards capturing income with assigned probabilities on profitable future price targets. Thus the Examiner should be reversed for this reason as well, as under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966), the Examiner has not properly ascertained the differences

between the prior art and the claims in issue, but has misinterpreted the prior art references relied upon.

O'Brien's methodology is not an income approach as in the claimed invention, but instead is a production based approach. Thus, O'Brien is clearly deficient and in actuality teaches away from the claimed invention. O'Brien does not recognize, let alone teach the benefits of an income approach and a marketing system which uses an income approach. O'Brien's production-oriented approach is different from, inconsistent with, and likely inferior to the claimed methodology which emphasizes the income approach.

5. Neither Hay et al. nor Remley et al. nor O'Brien disclose "electronically providing marketing information to the agricultural producers in order to update the written agricultural marketing plans...wherein the updated marketing information comprises probabilities of price targets"

None of these references disclose using "probabilities of price targets" to assist in developing and updating an action plan. The objective of the invention include to maximize income, facilitate beneficial financing, and assure income to pay off debts. Financing is underwritten by strategic commodity marketing action plan that maximizes income (pre-selling the exact, right amount of commodities at the best, most certain prices by predicting profitable future price targets with assigned probabilities. Placing a probability on each price target greatly assists in the decisive, positive action of the producer. The strategic commodity marketing is underwritten by crop revenue insurance that assures business income and debt payoff. Thus, the Examiner should be reversed for this independent reason as well.

B. Claim 29 is nonobvious with respect to U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of U.S. Patent Publication No. 2002/0023052A1 to Remley et al. and further in view of O'Brien ("Grain Marketing Plans for Farmers").

1. Neither Hay et al. nor Remley et al. nor O'Brien, alone or in combination disclose "determining a marketing financial risk score for each agricultural enterprise of the business, the marketing financial risk score associated with financial risks related to markets and income of each of the agricultural enterprises."

The Examiner cites to paragraph 52 of Hay as disclosing this step. The plain language of claim 29 provides a definition for the marketing financial risk score. Hay's general discussion regarding risks does not describe a marketing financial risk score. Moreover, when paragraphs 51 and 52 of Hay are considered together, the Examiner's improper interpretation of Hay becomes even more apparent. Note that the only use of the term "market" in either of these paragraphs is with respect to "customer market price expected" (paragraph 52) which is not a part of the "risk factors" discussed in paragraph 51, let alone a "marketing financial risk score" as claimed. Again, Hay is directed towards evaluation of a producer's operation to determine an offering price for a production contract and does not disclose calculating a marketing financial risk score. Thus the Examiner should be reversed for this reason as well, as under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966), the Examiner has not properly ascertained the differences between the prior art and the claims in issue, but has misinterpreted the prior art references relied upon as neither Hay, nor Remley et al. nor O'Brien disclose such a limitation.

2. Neither Hay et al. nor Remley et al. nor O'Brien alone or in combination disclose "calculating a level of crop revenue insurance for each of the agricultural enterprises to protect revenue generated from pre-selling, thereby underwriting the pre-selling with the crop revenue insurance and underwriting the assured income with the pre-selling."

Claim 29 requires "calculating a level of crop revenue insurance for each of the agricultural enterprises to protect revenue generated from pre-selling, thereby underwriting the pre-selling with the crop revenue insurance and underwriting the assured income with the pre-selling." O'Brien is deficient with respect to claim 29 at least for the same reasons it is deficient with respect to claim 15. The Examiner has not alleged that Hay et al. nor Remley et al. disclose this limitation. Indeed, they do not. As the claim language makes clear the level of crop revenue insurance is calculated so as to protect revenue generated from pre-selling, thereby underwriting the pre-selling with the crop revenue insurance and underwriting the assured income with the pre-selling. Thus the Examiner should be reversed as under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966), the Examiner has not properly ascertained the differences between the prior art and the claims in issue, but has misinterpreted the prior art references relied upon.

It is further submitted that the Examiner did not properly evaluate evidence of secondary considerations, as also required under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966). Here, letters were submitted from client banks who use the inventor's methodology were submitted as well as a declaration from the inventor (Exhibit 1). Clearly, being able to assure an income is beneficial as it allows a producer to assure an income sufficient to payoff debt, thus underwriting financing. This is beneficial to banks providing financing as well as to producer as it allows the producer to receive financing in the first place. It is submitted that these letters and declarations are indicative of secondary indicia of non-obviousness such as a long-felt need for the problem being solved, the unexpected results obtained, and commercial success of the methodology.

C. Claims 17 and 23 are nonobvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of O'Brien ("Grain Marketing Plans for Farmers").

Claims 17 and 23 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Hay et al. (US 2002/0059091 A1) in view of O'Brien ("Grain Marketing Plans for Farmers"). Claim 17 and claim 23 are patentably distinguishable over the combination of Hay et al and O'Brien. In particular, neither prior reference alone or in combination discloses "calculating a level of crop revenue insurance to assure at least a predetermined level of income from sale of predetermined pre-sell quantities of crops, thereby underwriting the predetermined level of income by pre-selling and underwriting the pre-selling by the level of crop revenue insurance." Thus the Examiner should be reversed as under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966), the Examiner has not properly ascertained the differences between the prior art and the claims in issue, but has misinterpreted the prior art references relied upon.

D. Claims 18 and 19 are nonobvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of U.S. Patent Publication No. 2002/0023052A1 to Remley et al. and further in view of O'Brien ("Grain Marketing Plans for Farmers").

Claims 18 and 19 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hay et al. (US 2002/0059091 A1) in view of Remley et al. (US 2002/0023052 A1), and further in view of O'Brien ("Grain Marketing Plans for Farmers"). Claim 18 recites: "A method of providing assured income for agricultural crops comprising: underwriting financing of an independent agricultural producer of the agricultural crops by developing a strategic marketing action plan for the independent producer which provides the assured income based on a minimum level of crop yield and a predetermined minimum crop price achieved by pre-selling, the developing of the strategic marketing action plan including determination of a financial assessment score associated with the producer and a marketing

financial risk score defining financial risks related to markets and income of the producer to assist in determining the assured income for the producer; underwriting the strategic marketing action plan with crop insurance to assure the minimum level of crop to be sold; updating the strategic marketing action plan with electronically supplied updated marketing information; and implementing the updated strategic marketing action plan to capture additional income beyond the assured income."

Claim 18's methodology is an income approach, assuring a first level of income (which could be used to guarantee debt payoff) and providing the opportunities for additional income in a manner that is tailored to the producer's ability to tolerate risks. O'Brien does not use an income approach, but a price approach. As such, O'Brien teaches away from the claimed invention. On page 23, O'Brien sets as a price goal the "breakeven." This is not an income approach to a marketing plan; it is a price approach from no objectivity. A price approach focuses on price, an income approach focuses on income. When income is the focus, instead of price, available insurance and marketing tools can be used in a manner that assures income and provides opportunities for additional income. With a price approach, there will be uncertainty about income, and a producer takes on the risks associated with the market. Attempting to maximize price or to protect price is not the same as maximizing or protecting income, although there is some relationship between the price and income. In the conventional instance where a producer produces and then sells at a market price, the greater the market price, the greater the income, but of course there is great uncertainty in the market price with lower prices yielding lower income. **Moreover, such a relationship does not take into account the cost of marketing tools, the costs of crop revenue insurance, the probability or objectivity of reaching a particular future price target, and all the attendant production and market risks, so when all factors are accounted for, a higher price or higher production levels does not necessarily mean more income.** An income approach is directed towards: capturing and protecting income as opposed to price; recognizes the difference between price and income and between production and income; and allows an income of a particular level to be assured before the crop is grown.

As a whole, O'Brien's approach is based on a producer's self-assessment, including expected price trends. **It does not provide a systematic and disciplined approach which is updated with electronically supplied updated marketing information.** The result is a marketing plan that can not be relied upon by those providing financing. This is in significant contrast to the present invention, as it is clear from the declaration of Gerald Murphy (signed, August 15, 2005, and submitted September 2, 2005) and its appendices which include letters from two separate banks. The value of this income approach of the present invention to assure income and payoff debt is specifically included in the letter submitted as exhibit A1 to the declaration of Gerald Murphy. Such evidence should be considered as secondary indicia of non-obviousness. It is further observed that O'Brien's self-assessment does not provide for any type of numbering scoring system or weighting.

E. Claims 20, 21, and 22 are nonobvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view O'Brien ("Grain Marketing Plans for Farmers") and further in view of Friedman ("Dictionary of Business Terms").

Claims 20, 21, and 22 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hay et al. (US 2002/0059091 A1) in view of O'Brien ("Grain Marketing Plans for Farmers"), and further in view of Friedman ("Dictionary of Business Terms."). The Examiner recognizes that neither Hay nor Remley disclose computing a numeric weighted average and wherein the weighted average includes a weighted Z-factor (Office Action of May 17, 2006, p. 9, numbered paragraph 6). Thus, the Examiner relies upon Friedman.

Dictionaries disclose terms and their definitions. Claim 21 recites "wherein the weighted average includes a weighted Z-factor." The Examiner relies upon Friedman for teaching a weighted z-factor, yet its use and definition is with respect to a manufacturing business as opposed to an agricultural business. There is no teaching in either Hay et al. nor O'Brien et al nor Friedman of using a Z-factor in evaluating an agricultural enterprise, let alone in formulating a marketing plan for an agricultural enterprise. Furthermore, the dictionary, does not explain how to use the Z-factor. It is further observed that the z-factor

analysis used by the inventor was adapted to a traditional agricultural business as described in the Specification pp. 22-23. **The Examiner's reliance on the dictionary is improper hindsight and no convincing line of reasoning has been provided by the Examiner to take a manufacturing concept, adapt it to an agricultural production, and apply it to an agricultural production in any form, let alone to formulating a marketing plan.** As the Supreme Court has recently articulated in *KSR Int'l Co. v. Teleflex, Inc.*, 82 USPQ2d 1385, 1396 (2007), it can be "important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the [prior art] elements" in the manner claimed. The Supreme Court only found obviousness to be present after "convincing evidence" of obviousness was provided. *Id.* at 1400. No such convincing evidence or line of reasoning has been provided, and therefore the Examiner should be reversed.

The Examiner also recognizes that neither Hay, nor Remley or Friedman expressly disclose a weighted marginal income rate. Yet the Examiner finds that it would have been obvious to a person of ordinary skill in the art at the time of the invention to include the rate for the motivation of determining the financial risks associated with the enterprise. (Office Action of May 17, 2006, p. 10, numbered paragraph 6). Again, the Examiner is engaged in improper hindsight, without convincing evidence or reasoning and must be reversed.

Neither Hay, nor Remley, nor Friedman is directed towards an income approach, thus why would any of these references be concerned with a weighted marginal income rate?

Moreover, the Examiner's purported motivation is inconsistent with the references cited. The weighted marginal income rate is used in computing the marketing financial risk score. The marketing financial risk score, as defined in claim 19, defines "financial risks related to markets and income of the producer." None of the cited references alone in combination use a marketing financial risk score or any type of score which includes financial risks related to markets and income of the producer.

Thus, again, the Examiner has failed to meet the requirements articulated in *KSR Int'l Co. v. Teleflex, Inc.*, 82 USPQ2d 1385 (2007), as no convincing reason has been provided. The Examiner should be reversed.

F. Claims 24-28 are nonobvious over U.S. Patent Publication No. 2002/0059091A1 to Hay et al. in view of O'Brien ("Grain Marketing Plans for Farmers") and further in view of U.S. Patent No. 6,990,459 to Schneider.

Claims 24-28 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hay et al. (US 2002/0059091 A1) in view of O'Brien ("Grain Marketing Plans for Farmers"), and further in view of Schneider (US 6,990,459). These claims all depend from claim 17. These rejections should be reversed for the same reasons expressed with respect to claim 17.

In addition, Schneider is directed towards a production system, not a marketing system that assures income while allowing for capturing additional income. As such, Schneider is directed towards production management such as by attempting to provide the producer the best combination of acres and the best combination of expense inputs while covering production costs. It must be understood that optimizing production and optimizing income are different concepts. In other words, Schneider is directed towards how to raise a crop and the invention of claim 17 from which claims 24-28 depend is directed towards how to sell the crop.

Thus, the Examiner is engaged in improper hindsight by combining Hay et al. in view of O'Brien et al and Schneider et al. The Examiner fails to take into account the invention as a whole—a systematic income approach to selling a crop which assures income (and thus, the availability of funds to payoff debt obligations) while allowing for capturing additional income. Again, the Examiner also fails to consider the evidence of secondary indicia of nonobviousness submitted, indicative of a long-felt need, commercial success, and unexpected results. The claimed invention addresses the long-felt need for banks to reduce speculation in loaning to agricultural enterprises, while putting in place a system that does not adversely affect the producer (by unduly limiting income) so is acceptable to producers. The use of the method and system by the banks evidences commercial success. The income achieved by the agricultural producers evidences unexpected results. The Examiner has not

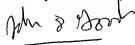
properly considered this evidence under *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966), and should be reversed for this reason as well.

IX. CONCLUSION

For the above-stated reasons, it is submitted that the claims are in a condition for allowability. The decision of the Examiner, therefore, should be reversed and the case allowed.

Enclosed herein please find the Appeal Brief and required fee of \$250. If this amount is not correct, please consider this a request to debit or credit Deposit Account No. 26-0084 accordingly.

Respectfully submitted,



JOHN D. GOODHUE, Reg. No. 47,603
McKEE, VOORHEES & SEASE
Attorneys of Record
CUSTOMER NO. 22885

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X. APPENDIX - CLAIMS

15. A computer-assisted method of providing agricultural marketing services to independent agricultural producers to assist in raising income of the agricultural producers, comprising:

developing written agricultural marketing action plans for the agricultural producers, the agricultural marketing action plans requiring updated marketing information; tying financial obligations of the agricultural producers to the use of the written agricultural marketing action plans such that the agricultural producers are required to commit to using the written agricultural marketing plans as a condition for receiving financing; electronically providing marketing information to the agricultural producers in order to update the written agricultural marketing action plans; wherein the updated marketing information comprises probabilities of price targets; wherein the step of developing written agricultural marketing action plans for each of the agricultural producers comprises

- (a) eliciting information from the producer;
- (b) performing a financial assessment for an agricultural business of the independent producer;
- (c) determining a financial assessment score based on the financial assessment;
- (d) calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numeric value describing financial risks related to markets and income of each agricultural enterprise associated with the agricultural business;
- (e) determining pre-sell quantities using the financial assessment score, the marketing financial risk score and a price risk associated with a commodity market;
- (f) calculating a level of crop revenue insurance to assure a predetermined level of income from sale of predetermined pre-sell quantities of crops for use in

meeting the financial obligations, such that the financing is underwritten by pre-selling and the pre-selling is underwritten by the level of crop revenue insurance;

- (g) forming a plan of action for agricultural marketing which makes decisions based on the marketing information, the financial assessment, the marketing financial risk score, the pre-sell quantities, and the level of crop revenue insurance.

17. A computer-assisted method of creating a strategic agricultural marketing plan for an agricultural business of an independent agricultural producer comprising:
eliciting information from a producer;
performing a financial assessment of the business of the independent agricultural producer;
determining a financial assessment score based on the financial assessment;
calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numeric value describing financial assessment factors associated with financial risks related to markets and income of each enterprise of the agricultural businesses;
receiving a price risk from a marketing service, wherein the price risk is a price risk of a commodity market and is determined based on a computer analysis;
determining pre-sell quantities using the financial assessment score, the marketing financial risk score and the price risk of the commodity market;
calculating a level of crop revenue insurance to assure at least a predetermined level of income from sale of predetermined pre-sell quantities of crops, thereby underwriting the predetermined level of income by pre-selling and underwriting the pre-selling by the level of crop revenue insurance.

18. A method of providing assured income for agricultural crops comprising:
underwriting financing of an independent agricultural producer of the agricultural crops by
developing a strategic marketing action plan for the independent producer which
provides the assured income based on a minimum level of crop yield and a
predetermined minimum crop price achieved by pre-selling, the developing of the
strategic marketing action plan including determination of a financial assessment
score associated with the producer and a marketing financial risk score defining
financial risks related to markets and income of the producer to assist in determining
the assured income for the producer;
underwriting the strategic marketing action plan with crop insurance to assure the
minimum level of crop to be sold;
updating the strategic marketing action plan with electronically supplied updated
marketing information; and
implementing the updated strategic marketing action plan to capture additional
income beyond the assured income.
19. The method of claim 18 wherein the financing is provided to a producer conditioned
on use of the strategic marketing action plan.
20. The method of claim 17 wherein the step of calculating a marketing financial risk
score includes computing a numeric weighted average.
21. The method of claim 17 wherein the weighted average includes a weighted Z-factor.
22. The method of claim 20 wherein the weighted average includes a weighted marginal
income rate.

23. The method of claim 17 wherein the step of computing a marketing financial risk is computing a weighted average of line of credit per acre, line of credit per assured income, current ratio, ratio of working capital to total crop expense, operating expense ratio, asset turnover ratio, interest expense ratio, operating profit ratio, return on assets ratio, line of credit to net worth ratio, leverage ratio, Z factor analysis, repayment margin and marginal income rate.

24. The method of claim 17 wherein the step of calculating the level of crop revenue insurance comprises eliciting crop production information concerning the agricultural enterprise; eliciting debt obligations of the agricultural enterprise; and selecting a crop revenue insurance level greater than the debt obligations to provide a best level of crop revenue insurance and thereby underwriting financing to the producer by the marketing plan and underwriting the marketing plan by the best level of crop revenue insurance.

25. The method of claim 17 wherein the step of calculating the level of crop insurance includes a computer program comprising:

- a loan amount input;
- a total number of acres input;
- an interest rate on a loan input;
- an average future price to pre-sell crops input;
- a probability of reaching the average future price to pre-sell crops input;
- an expected cash basis input;
- an expected fall future price input;
- a probability of reaching the expected fall future price of crops input;
- an expected fall cash basis input;
- a cost of a call option on pre-sold crop input;
- a cost of a call on unsold crop input;
- a cost of a put option on pre-sold crop input;

a cost of a put option on unsold crop input;
a LDP value on pre-sold crop input;
a minimum price for an unsold harvest input;
a set of coverage level costs for insurance coverage inputs;
a yield based on actual production history input;
an expected spring price input;
an expected harvest price input;
an anticipated pre-sell amount of crops input;
an anticipated harvest yield input;
a county loan price input;
a displayable output for the crop revenue insurance level that provides the best crop insurance coverage level most likely to produce the most revenue; and
a calculation component capable of receiving the inputs and performing mathematical operations on the inputs to produce the output.

26. The method of claim 25 wherein the computer program further comprises a type of crop input.

27. The method of claim 25 wherein the computer program further comprises an estimated freedom to farm payment input, the calculation component receiving the estimated freedom to farm payment input.

28. The method of claim 25 wherein the computer program further comprises a set of underwriting on commodity future trading allowability inputs, the calculation component receiving the set of underwriting on commodity future trading allowability inputs.

29. A computer-assisted method of creating a strategic independent agricultural marketing plan for an agricultural business, comprising:

determining a financial assessment score for the agricultural business;

determining a marketing financial risk score for each agricultural enterprise of the business, the marketing financial risk score associated with financial risks related to markets and income of each of the agricultural enterprises;

receiving a price risk from a marketing service, wherein the price risk is a price risk associated with a commodity market and is determined using a computer analysis;

determining a level of assured income for each of the agricultural enterprises based on the financial assessment score, the marketing financial risk score, and the price risk;

determining pre-sell quantities of crops for pre-selling for each of the agricultural enterprises;

calculating a level of crop revenue insurance for each of the agricultural enterprises to protect revenue generated from pre-selling, thereby underwriting the pre-selling with the crop revenue insurance and underwriting the assured income with the pre-selling.

XI. EVIDENCE APPENDIX

Declaration of Gerald Murphy (signed, August 15, 2005, and submitted September 2, 2005) and its appendices which include letters from two separate banks. This evidence was entered by the Examiner and considered in the Office Action dated November 17, 2005.

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT : **MURPHY**, Gerald B.
SERIAL NO : 09/777,761
FILED : February 6, 2001
TITLE : **METHOD FOR STRATEGIC COMMODITY
MANAGEMENT THROUGH MASS CUSTOMIZATION**

Grp./A.U. : 3626
Examiner : NAJARIAN, Lena
Conf. No. : 4274
Docket No. : P04722US00

DECLARATION OF GERALD B. MURPHY

I, Gerald B. Murphy, the sole inventor of the above-identified patent application,
hereby declare and state the following:

1. I have reviewed the Office Action of June 3, 2005 and the references cited by the Examiner therein, including the Schneider reference. It is clear to me that Schneider is a production system and not an income system for assuring revenue of my present invention.
2. I am aware that Michigan State has performed an income model that shows that in every year of production there is at some time a high enough price that a farmer would make a profit, yet farmers do not always do so.
3. It is my understanding, and it is my experience that about two-thirds of the farmers sell in the bottom one-third of the markets.
4. My clients, using the system described in the above-identified patent application, are in the top 80% of farmers in terms of the price that their crops are sold at.

5. Due to the success of my system described in the above-identified patent application I maintain an approximately 92% retention rate of clients. This retention rate is significantly higher than others in the industry. For example, Brock Associates, a well-known commodity advisory firm that works with farmers has a retention rate of only approximately 15%.

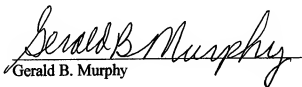
6. It is also my experience that on a number of occasions, farmers are able to secure loans that they otherwise would not be able to secure because of the confidence of banks in my system as described in the above-identified application. Attached as Exhibit A are letters from Carroll County State Bank and Westside State Bank describing their experience with my system.

7. My system as described in the above-identified patent application ensures a level of income for farmers which gives banks or other financial institutions security in knowing that the farmer is assured of meeting their financial obligations. See Exhibit A.

8. My system as described in the above-identified patent application has been adopted by various financial institutions including Farm Credit Services.

The undersigned further declares that all statements made herein of his own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application of any patent issuing thereon.

Date August 15, 2005


Gerald B. Murphy



Member F.D.I.C.

July 6, 2005

Mr. Jerry Murphy
16713 Hwy 92
Indianola, Iowa 50125

Dear Jerry,

I want to thank you for helping the management of Carroll County State Bank to understand the value of your "assured income" program combining commodity marketing strategies to Federal Crop Insurance programs in order to guarantee farm income. To know what the actual income will be greatly increases our confidence to approve loans and advance loan proceeds for crop production. Without this complete financial system, we do not think we could provide operating funds to some of our borrowers.

Farm producers really like the systematic objective method of establishing market targets in order to pre-sell that your business system provides. It enhances their discipline to lock in profitable prices in order to stay in business and provide peace of mind.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael J. Hagan".

Michael J. Hagan
Vice-President

EXHIBIT

A1



103 N. Main
P.O. Box 53
Halbur, Iowa 51444
Phone 712-658-2071
Fax 712-658-2305

115 Hwy 30
P.O. Box 33
Vail, Iowa 51465
Phone 712-677-2211
Fax 712-677-2211

P.O. Box 425
Wall Lake, Iowa 51466
Phone 712-664-2700
Fax 712-664-2710

401 First Street
P.O. Box 77
Westside, Iowa 51467
Phone 712-669-4322
Fax 712-669-4321



July 6, 2005


Jerry Murphy
United Ag Resources
16713 Highway 92
Indianola, IA 50125

Dear Jerry,

Please accept this letter as our indication of appreciation for your "Assured Income" Program. Some of our Bank customers are using your program with good results. They like the systematic marketing methods supported by the Federal Crop Insurance coverage that allows them to pre-sell crops for a profit and guarantee their income.

Of course, the Bank certainly appreciates this guaranteed income approach, it takes a lot of the speculation out of farm lending and improves our customer's financial condition. Your business system gives our customers a method to combine commodity marketing with Federal Crop Revenue Plans to insure their income is sufficient to cover their input costs.

Sincerely,


James A. Borchert
Vice President

HALBUR • VAIL • WALL LAKE • WESTSIDE

EXHIBIT

tabler

A2

XII. RELATED PROCEEDING APPENDIX

None